

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARVIN C. HARRIS,	)	No. C 04-1478 SBA (PR)
	)	
Petitioner,	)	<b><u>ORDER DENYING PETITION</u></b>
v.	)	<b><u>FOR WRIT OF HABEAS</u></b>
	)	<b><u>CORPUS</u></b>
MENDOZA POWERS, Acting Warden,	)	
	)	(Docket nos. 60, 63)
Respondent.	)	
_____	)	

**INTRODUCTION**

Petitioner Marvin C. Harris, a prisoner at the Avenal State Prison, filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. The matter is now submitted for the Court's consideration of the merits of the petition. For the reasons discussed below, the petition is DENIED.

**PROCEDURAL BACKGROUND**

In 1984, Petitioner was convicted of second-degree murder and of using a knife in the commission of the murder. (Resp't Ex. 1.) He was sentenced to fifteen years to life in prison, including a one-year dangerous weapon enhancement. (Id.) The present petition does not challenge Petitioner's underlying conviction. Rather, it challenges the denial of parole suitability by the Board of Prison Terms (hereinafter "BPT") held in 2002.<sup>1</sup>

On December 4, 2002, the BPT denied Petitioner parole. (Resp't Ex. 3.) The BPT identified several factors in support of its determination that Petitioner was not suitable for parole. The factors identified included the circumstances of the murder, Petitioner's prior criminal and unstable social history, his inadequate performance in prison (i.e., nine counseling memoranda and four serious rule violation reports since his last physical appearance before the BPT), his marginal vocational

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<sup>1</sup> The BPT was abolished on July 1, 2005 and replaced with the Board of Parole Hearings. See CAL. GOV. CODE § 12838.4. The Court will continue to use "BPT" to denote the past actions of the Board of Parole Hearings, the real party in interest.

1 upgrade, his need for additional self-help and/or therapy programs, and the Oakland Police  
2 Department's opposition to parole. (Id.)

3 Petitioner sought habeas relief in state court. In April, 2004, the Alameda County Superior  
4 Court summarily denied his state habeas petition for failure to state a prima facie case. (Resp't Ex.  
5 8.) There is no record that Petitioner filed a petition for writ of habeas corpus in the state appellate  
6 court. (Resp't Ex. 9.) On March 23, 2005, the California Supreme Court summarily denied his state  
7 habeas petition. (Resp't Ex. 11.)

8 On April 15, 2004, Petitioner filed his federal petition challenging the 2002 decision by the  
9 BPT finding him unsuitable for parole (docket no. 1). He claims that he should have been found  
10 suitable for parole under the statutory or regulatory standards. He alleges that the decision to find  
11 him unsuitable for parole violated his due process rights, because there was no evidence to support  
12 the finding. He also alleges that the denial of parole unlawfully increased his sentence to life  
13 without the possibility of parole, in violation of the ex post facto prohibition.

14 The Court subsequently dismissed the petition with leave to amend on May 10, 2004 (docket  
15 no. 6). The Court determined that it appeared from the petition that the claims were unexhausted  
16 because Petitioner did not allege that he pursued his habeas claims to the California Supreme Court.  
17 (May 10, 2004 Order at 2.) Petitioner was given leave to amend his petition, "in case he  
18 inadvertently omitted habeas petitions that he filed in the higher state courts." (Id.)

19 On June 4, 2004, Petitioner filed his first amended petition stating that the claims presented  
20 therein were unexhausted and pending in a state habeas petition before the California Supreme Court  
21 (docket no. 7).

22 On April 4, 2005, the Court received Petitioner's second amended petition (hereinafter  
23 "SAP"). Petitioner stated that his state habeas petition had been denied by the California Supreme  
24 Court on March 23, 2005.

25 The Court served Petitioner's first amended petition on July 25, 2005, without reviewing his  
26 SAP (docket no. 17). The Court directed Respondent to file an answer and/or dispositive motion.

27 On September 26, 2005, Respondent moved to dismiss the petition for failure to: (1) exhaust  
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1 state court remedies; (2) present a federal question for review; and (3) state a valid ex post facto  
2 claim. Petitioner opposed the motion, and Respondent filed a reply to the opposition.

3 On September 6, 2006, the Court denied in part and granted in part Respondent's motion to  
4 dismiss. (Sept. 6, 2006 Order at 7.) The Court denied the motion to dismiss as to Respondent's  
5 claim of Petitioner's failure to exhaust his available state court remedies. (Id. at 2-3.) The Court  
6 granted Petitioner leave to file his SAP with his newly-exhausted due process claim,<sup>2</sup> and found that  
7 he exhausted his state court remedies because his SAP related back to his first amended petition.  
8 (Id. at 4-5.) The Court denied the motion to dismiss as to Petitioner's claim of a due process  
9 violation relating to the BPT's 2002 parole denial upon finding that he had a liberty interest in  
10 parole. (Id. at 5-6.) Finally, the Court granted Respondent's motion to dismiss as to Petitioner's ex  
11 post facto claim upon finding that the claim was legally meritless. (Id. at 6-7.) A second order to  
12 show cause was issued, and the SAP was served on Respondent. (Id. at 7.) The Court directed  
13 Respondent to file an Answer showing cause why a writ of habeas corpus should not be issued as to  
14 Petitioner's due process claim. (Id.)

15 On November 6, 2006, Respondent filed a motion to dismiss the SAP on the ground that it  
16 alleges insufficient facts to support Petitioner's due process claim (docket no. 45). Petitioner  
17 opposed the motion.

18 On June 5, 2007, the Court denied Respondent's motion to dismiss the SAP upon finding that  
19 Petitioner's due process claim did not require additional facts for Respondent to file an Answer.  
20 (June 5, 2007 Order at 3.) Respondent was again ordered to show cause why a writ should not be  
21 issued on Petitioner's due process claim. (Id.)

22 On August 6, 2007, Respondent filed an Answer (docket no. 59). Petitioner filed two  
23 Traverses (docket nos. 61, 62). The Court will proceed to consider the merits of Petitioner's due  
24 process claim relating to the BPT's 2002 parole denial.  
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26  
27 <sup>2</sup> While Petitioner's SAP is difficult to decipher, the Court has liberally construed it as  
28 claiming a due process violation based on his allegation that the BPT's 2002 parole denial was not  
supported by some evidence.

**STANDARD OF REVIEW****I. AEDPA**

Under the Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA"), a district court may grant a petition challenging a state conviction or sentence on the basis of a claim that was "adjudicated on the merits" in state court only if the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court has "adjudicated" a petitioner's constitutional claim "on the merits" for purposes of § 2254(d) when it has decided the petitioner's right to post-conviction relief on the basis of the substance of the constitutional claim advanced, rather than denying the claim on the basis of a procedural or other rule precluding state court review on the merits. Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004), cert. denied, 546 U.S. 963 (2005). It is error for a federal court to review de novo a claim that was adjudicated on the merits in state court. See Price v. Vincent, 538 U.S. 634, 638-43 (2003).

Section 2254(d) applies to a habeas petition from a state prisoner challenging the denial of parole. See Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126-27 (9th Cir. 2006).

**A. Section 2254(d)(1)**

Challenges to purely legal questions resolved by the state court are reviewed under § 2254(d)(1), under which a state prisoner may obtain habeas relief with respect to a claim adjudicated on the merits in state court only if the state court adjudication resulted in a decision that was "contrary to" or "involved an unreasonable application of" "clearly established Federal law, as determined by the Supreme Court of the United States." Williams (Terry) v. Taylor, 529 U.S. 362, 402-04, 409 (2000). While the "contrary to" and "unreasonable application" clauses have independent meaning, see id. at 404-05, they often overlap, which may necessitate examining a petitioner's allegations against both standards. See Van Tran v. Lindsey, 212 F.3d 1143, 1149-50 (9th Cir. 2000), overruled on other grounds; Lockyer v. Andrade, 538 U.S. 63, 70-73 (2003).

1                   **1.       Clearly Established Federal Law**

2                   "Clearly established federal law, as determined by the Supreme Court of the United States"

3 refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of

4 the relevant state-court decision." Williams, 529 U.S. at 412. "Section 2254(d)(1) restricts the

5 source of clearly established law to [the Supreme] Court's jurisprudence." Id. "A federal court may

6 not overrule a state court for simply holding a view different from its own, when the precedent from

7 [the Supreme] Court is, at best, ambiguous." Mitchell v. Esparza, 540 U.S. 12, 17 (2003). If there is

8 no Supreme Court precedent that controls on the legal issue raised by a petitioner in state court, the

9 state court's decision cannot be contrary to, or an unreasonable application of, clearly-established

10 federal law. See, e.g., Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004).

11                   The fact that Supreme Court law sets forth a fact-intensive inquiry to determine whether

12 constitutional rights were violated "obviates neither the clarity of the rule nor the extent to which the

13 rule must be seen as 'established'" by the Supreme Court. Williams, 529 U.S. at 391. There are,

14 however, areas in which the Supreme Court has not established a clear or consistent path for courts

15 to follow in determining whether a particular event violates a constitutional right; in such an area, it

16 may be that only the general principle can be regarded as "clearly established." Andrade, 538 U.S.

17 at 64-65. When only the general principle is clearly established, it is the only law amenable to the

18 "contrary to" or "unreasonable application of" framework. See id. at 73.

19                   Circuit decisions may still be relevant as persuasive authority to determine whether a

20 particular state court holding is an "unreasonable application" of Supreme Court precedent or to

21 assess what law is "clearly established." Clark v. Murphy, 331 F.3d 1062, 1070-71 (9th Cir.), cert.

22 denied, 540 U.S. 968 (2003); Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

23                   **2.       "Contrary to"**

24                   "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court

25 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the

26 state court decides a case differently than [the Supreme] Court has on a set of materially

27 indistinguishable facts." Williams, 529 U.S. at 413. A "run-of-the-mill state-court decision" that

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1 correctly identifies the controlling Supreme Court framework and applies it to the facts of a  
 2 prisoner's case "would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529  
 3 U.S. at 406. Such a case should be analyzed under the "unreasonable application" prong of  
 4 § 2254(d). See Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

### 5 **3. "Unreasonable Application"**

6 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the  
 7 state court identifies the correct governing legal principle from [the Supreme] Court's decisions but  
 8 unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413.

9 "[A] federal habeas court may not issue the writ simply because that court concludes in its  
 10 independent judgment that the relevant state-court decision applied clearly established federal law  
 11 erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411; accord  
 12 Middleton v. McNeil, 541 U.S. 433, 436 (2004) (per curiam) (challenge to state court's application  
 13 of governing federal law must be not only erroneous, but objectively unreasonable); Woodford v.  
 14 Visciotti, 537 U.S. 19, 25 (2002) (per curiam) ("unreasonable" application of law is not equivalent to  
 15 "incorrect" application of law).

16 Evaluating whether a rule application was unreasonable requires considering the relevant  
 17 rule's specificity; if a legal rule is specific, the range of reasonable judgment may be narrow; if it is  
 18 more general, the state courts have more leeway. Yarborough v. Alvarado, 541 U.S. 652, 664  
 19 (2004). Whether the state court's decision was unreasonable must be assessed in light of the record  
 20 that court had before it. Holland v. Jackson, 542 U.S. 649, 651 (2004) (per curiam).

21 The "objectively unreasonable" standard is not a clear error standard. Andrade, 538 U.S. at 75-  
 22 76 (rejecting Van Tran's use of "clear error" standard); Clark, 331 F.3d at 1067-69 (acknowledging the  
 23 overruling of Van Tran on this point). After Andrade, "[t]he writ may not issue simply because, in our  
 24 determination, a state court's application of federal law was erroneous, clearly or otherwise. While the  
 25 'objectively unreasonable' standard is not self-explanatory, at a minimum it denotes a greater degree of  
 26 deference to the state courts than [the Ninth Circuit] ha[s] previously afforded them." Id. In examining  
 27 whether the state court decision was unreasonable, the inquiry may require analysis of the state court's  
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1 method as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003).

2 **B. Section 2254(d)(2)**

3 A federal habeas court may grant the writ if it concludes that the state court's adjudication of  
4 the claim "resulted in a decision that was based on an unreasonable determination of the facts in  
5 light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). An  
6 unreasonable determination of the facts occurs where the state court fails to consider and weigh  
7 highly probative, relevant evidence, central to petitioner's claim, that was properly presented and  
8 made part of the state-court record. Taylor v. Maddox, 366 F.3d 992, 1005 (9th Cir. 2004). A  
9 district court must presume correct any determination of a factual issue made by a state court unless  
10 the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C.  
11 § 2254(e)(1).

12 **C. Review of Parole Suitability Decisions**

13 The Ninth Circuit has applied § 2254(d) to review of parole suitability decisions. See Rosas  
14 v. Nielsen, 428 F.3d 1229, 1232 (9th Cir. 2005) (per curiam); see also McQuillion v. Duncan, 306  
15 F.3d 895, 901 (9th Cir. 2002) (assuming without deciding that AEDPA deferential standard of  
16 review under § 2254 applies to such decisions).

17 **D. Review Without a Reasoned State Court Decision**

18 The Court will look to the last reasoned state court decision in determining whether the law  
19 applied to a particular claim by the state court was contrary to the law set forth in the cases of the  
20 United States Supreme Court or whether an unreasonable application of such law has occurred.  
21 Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S. 919 (2003). Where the  
22 state court fails to give any reasoning whatsoever in support of the denial of a claim arising under  
23 Constitutional or federal law, the Ninth Circuit has held that the Court must perform an independent  
24 review of the record to ascertain whether the state court decision was an unreasonable application of  
25 clearly established federal law. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); accord  
26 Lambert v. Blodgett, 393 F.3d 943, 970 n.16 (9th Cir. 2004). The Court need not otherwise defer to  
27 the state court decision: "A state court's decision on the merits concerning a question of law is, and  
28



1 should be, afforded respect. If there is no such decision on the merits, however, there is nothing to  
 2 which to defer." Greene v. Lambert, 288 F.3d 1081, 1089 (9th Cir. 2002). Nonetheless, "while we  
 3 are not required to defer to a state court's decision when that court gives us nothing to defer to, we  
 4 must still focus primarily on Supreme Court cases in deciding whether the state court's resolution of  
 5 the case constituted an unreasonable application of clearly established federal law." Fisher v. Roe,  
 6 263 F.3d 906, 914 (9th Cir. 2001). In other words, the Court assumes the state court applied the  
 7 applicable federal law, and analyzes whether the decision of the state court was based on an  
 8 objectively unreasonable application of that law. See Himes, 336 F.3d at 853.

## 9 **II. Exhaustion**

10 Prisoners in state custody who wish to challenge collaterally in federal habeas corpus  
 11 proceedings either the fact or length of their confinement are required first to exhaust state judicial  
 12 remedies, either on direct appeal or through collateral proceedings, by presenting the highest state  
 13 court available with a fair opportunity to rule on the merits of each and every claim they seek to  
 14 raise in federal court. See 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34  
 15 (1987). It is undisputed that Petitioner exhausted his state court remedies as to the due process claim  
 16 raised in his federal petition.

## 18 **FACTUAL BACKGROUND**

19 Although Petitioner is not challenging the validity of his underlying criminal conviction, the  
 20 facts regarding the commitment offense were relied upon by the BPT to deny Petitioner parole in  
 21 2002. The facts regarding the circumstances surrounding the offense were read into the record at the  
 22 hearing and are in accord with those summarized in the probation report prepared for the sentencing  
 23 court after Petitioner's conviction. The Court includes the following information, derived from the  
 24 Alameda County Probation Officer's Report and Recommendation, about the murder:

25 At approximately 12:45 p.m., Rosie Harris (wife of defendant), Veatrice Buckley (12-  
 26 year-old daughter of Rosie), and victim Cecil Marzett (21) were at Rosie's apartment.  
 27 Defendant came home and wanted to speak to Rosie in the bedroom. Veatrice had seen  
 28 the handle of a knife protruding from defendant's pocket and was afraid. Cecil (Rosie's  
 nephew) was telling Marvin [defendant] not to disrespect his auntie. Finally, all three --  
 Marvin, Rosie, and Cecil went to Marvin and Rosie's bedroom. Cecil and Marvin had  
 words to the effect:



1 Marvin: "She's my wife,"  
 2 Cecil: "She was my auntie first;"  
 3 Rosie: "That's right;"  
 4 Marvin: "Get out of my house."

5 Rosie tells Cecil to leave. Cecil turns to leave and as he does, Marvin stabs him in the  
 6 right front chest area with a long butcher-type knife. Veatrice sees this because she stood  
 7 watching in the hallway. Rosie did not see the first blow because she had turned to take a  
 puff off of her cigarette. When Rosie turned back around, Marvin was straddling Cecil  
 stabbing him.

8 (Resp't Ex. 2, Alameda County Probation Officer's Report and Recommendation at 3-4 [brackets  
 9 added].)

## 10 **DISCUSSION**

### 11 **I. Existence of a Protected Liberty Interest**

12 Before reaching the merits of Petitioner's due process claim, the Court notes that Respondent  
 13 has again raised the argument that Petitioner has no protected liberty interest in parole which would  
 14 entitle him to the protections of due process at parole suitability hearings. (Answer at 5.) As  
 15 mentioned above, Respondent first raised this argument in their motion to dismiss filed on  
 16 September 26, 2005 after the California Supreme Court discussed various aspects of California's  
 17 parole scheme in In re Dannenberg, 34 Cal. 4th 1061, cert. denied, 546 U.S. 844 (2005). In denying  
 18 the motion to dismiss on September 6, 2006, the Court found that the Ninth Circuit has rejected  
 19 Respondent's argument and has made clear that California inmates continue to have a liberty interest  
 20 in parole after Dannenberg. (Sept. 6, 2006 Order at 5-6 [citing Sass, 461 F.3d at 1125]). Thus, in  
 21 accord with Sass, Petitioner was entitled to the protections of due process at his BPT hearings.

### 22 **II. Due Process Claim**

#### 23 **A. Applicable Legal Standard**

24 "In analyzing the procedural safeguards owed to an inmate under the Due Process clause, [a  
 25 court] must look at two distinct elements: (1) a deprivation of a constitutionally protected liberty or  
 26 property interest, and (2) a denial of adequate procedural safeguards." Biggs v. Terhune, 334 F.3d  
 27 910, 913 (9th Cir. 2003). The second prong of this test is satisfied if (1) the inmate has been  
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1 afforded an opportunity to be heard and, if denied parole, informed of the reasons underlying the  
2 decision and (2) "some evidence" supports the decision to grant or deny parole. See Sass, 461 F.3d  
3 at 1129 (adopting some evidence standard for disciplinary hearings outlined in Superintendent v.  
4 Hill, 472 U.S. 445, 454-55 (1985)).

5 "To determine whether the some evidence standard is met 'does not require examination of  
6 the entire record, independent assessment of the credibility of witnesses, or weighing of the  
7 evidence. Instead, the relevant question is whether there is any evidence in the record that could  
8 support the conclusion reached'" by the parole board. Id. at 1128 (quoting Hill, 472 U.S. at 455-56).  
9 The "some evidence standard is minimal, and assures that 'the record is not so devoid of evidence  
10 that the findings of the . . . board were without support or otherwise arbitrary.'" Id. at 1129 (quoting  
11 Hill, 472 U.S. at 457). The some evidence standard of Hill is clearly established law in the parole  
12 context for purposes of § 2254(d). Sass, 461 F.3d at 1129.

13 Three Ninth Circuit cases provide the guideposts for applying the Hill "some evidence"  
14 standard on this point: Biggs, Sass, and Irons v. Carey, No. 05-15275, slip op. 8335, 8344 (9th Cir.  
15 July 13, 2007). Biggs explained that the value of the criminal offense fades over time as a predictor  
16 of parole suitability: "The Parole Board's decision is one of 'equity' and requires a careful balancing  
17 and assessment of the factors considered. . . . A continued reliance in the future on an unchanging  
18 factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the  
19 rehabilitative goals espoused by the prison system and could result in a due process violation."  
20 Biggs, 334 F.3d at 916-17. Biggs upheld the initial denial of a parole release date based solely on  
21 the nature of the crime and the prisoner's conduct before incarceration, but cautioned that "[o]ver  
22 time . . ., should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation,  
23 denying him a parole date simply because of the nature of Biggs's offense and prior conduct would  
24 raise serious questions involving his liberty interest in parole." Id. at 916. Next came Sass, which  
25 criticized the Biggs statements as improper and beyond the scope of the dispute before the court:  
26 "Under AEDPA it is not our function to speculate about how future parole hearings could proceed."  
27 Sass, 461 F.3d at 1129. Sass determined that the parole board is not precluded from relying on  
28

1 unchanging factors such as the circumstances of the commitment offense or the petitioner's pre-  
2 offense behavior in determining parole suitability. See id. (commitment offenses in combination  
3 with prior offenses provided some evidence to support denial of parole at subsequent parole  
4 consideration hearing). Sass also put to rest any idea from Biggs that the commitment crime and  
5 pre-offense behavior only support the initial denial of parole. Recently, Irons determined that due  
6 process was not violated by the use of the commitment offense and pre-offense criminality to deny  
7 parole for a prisoner sixteen years into his seventeen-to-life sentence. Irons emphasized that all  
8 three cases (Irons, Sass and Biggs) in which the court had "held that a parole board's decision to  
9 deem a prisoner unsuitable for parole solely on the basis of his commitment offense comports with  
10 due process, the decision was made before the inmate had served the minimum number of years  
11 required by his sentence." Irons, No. 05-15275, slip op. 8449. Interpreting this statement from Irons  
12 to suggest that the offense can only be relied on until the minimum number of years has been  
13 reached would suffer the same problem that Sass identified in Biggs: it is not the holding of the  
14 case. The dicta in Biggs and Irons are speculative and do not determine when a denial of parole  
15 based solely upon the commitment offense or pre-offense behavior violates due process. Neither  
16 logic nor Irons compel a decision that such reliance must cease when the prisoner reaches the  
17 minimum number of years in his sentence, such as the fifteenth year of a fifteen-to-life sentence.

18  
19 The upshot of these three cases is that the BPT can look at immutable events, such as the  
20 nature of the conviction offense and pre-conviction criminality, to predict that the prisoner is not  
21 currently suitable for parole even after the initial denial (Sass), but the weight to be attributed to  
22 those immutable events should decrease over time as a predictor of future dangerousness as the  
23 years pass and the prisoner demonstrates favorable behavior (Biggs and Irons). Sass did not dispute  
24 the principle that, other things being equal, a murder committed fifty years ago is less probative of a  
25 prisoner's current dangerousness than one committed ten years ago. Not only does the passage of  
26 time in prison count for something, exemplary behavior and rehabilitation in prison count for  
27 something according to Biggs and Irons. Hill's standard might be quite low, but it does require that  
28 the decision not be arbitrary, and reliance on only the facts of the crime might eventually make for

1 an arbitrary decision.

2 What little guidance has come from the Supreme Court suggests that judicial review should  
3 be extremely deferential to the original decisionmaker in the parole context. In addition to the very  
4 low evidentiary standard that Hill imposes, other Supreme Court comments suggest that the  
5 judiciary should be quite mindful of the subjective and predictive nature of a parole board's decision.  
6 See Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 13 (1979). "No ideal,  
7 error-free way to make parole-release decisions has been developed; the whole question has been  
8 and will continue to be the subject of experimentation involving analysis of psychological factors  
9 combined with fact evaluation guided by the practical experience of the actual parole  
10 decisionmakers in predicting future behavior. Our system of federalism encourages this state  
11 experimentation." Id.

12 **B. Parole for Murderers in California**

13 California uses indeterminate sentences for most non-capital murderers, with the term being  
14 life imprisonment and parole eligibility after a certain minimum number of years. A first degree  
15 murder conviction yields a minimum term of twenty-five years to life and a second degree murder  
16 conviction yields a base term of fifteen years to life imprisonment. See Dannenberg, 34 Cal. 4th at  
17 1078; CAL. PENAL CODE § 190. The upshot of California's parole scheme described below is that a  
18 release date normally must be set unless various factors exist, but the "unless" qualifier is so great  
19 that parole is a rarity rather than the norm for murderers.

20  
21 A BPT panel meets with an inmate one year before the prisoner's minimum eligible release  
22 date "and shall normally set a parole release date . . . . The release date shall be set in a manner that  
23 will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to  
24 the public, and that will comply with the sentencing rules that the Judicial Council may issue and  
25 any sentencing information relevant to the setting of parole release dates." CAL. PENAL CODE  
26 § 3041(a). Significantly, that statute also provides: The panel shall set a release date,  
27 unless it determines that the gravity of the current convicted offense or offenses, or the  
28 timing and gravity of current or past convicted offense or offenses, is such that  
consideration of the public safety requires a more lengthy period of incarceration for this

1 individual, and that a parole date, therefore, cannot be fixed at this meeting.

2 Id. § 3041(b).

3 One of the implementing regulations, Title 15 of the California Code of Regulations § 2401  
4 provides: "A parole date shall be denied if the prisoner is found unsuitable for parole under Section  
5 2402(c). A parole date shall be set if the prisoner is found suitable for parole under Section 2402(d).  
6 A parole date set under this article shall be set in a manner that provides uniform terms for offenses  
7 of similar gravity and magnitude with respect to the threat to the public." The regulation also  
8 provides that "[t]he panel shall first determine whether the life prisoner is suitable for release on  
9 parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and  
10 denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to  
11 society if released from prison." CAL. CODE REGS. tit. 15, § 2402(a).

12 In making its determination, the parole board may consider "[a]ll relevant, reliable  
13 information available," including,

14 the circumstances of the prisoner's social history; past and present mental state; past  
15 criminal history, including involvement in other criminal misconduct which is reliably  
16 documented; the base and other commitment offenses, including behavior before, during  
17 and after the crime; past and present attitude toward the crime; any conditions of  
18 treatment or control, including the use of special conditions under which the prisoner  
19 may safely be released to the community; and any other information which bears on the  
20 prisoner's suitability for release. Circumstances which taken alone may not firmly  
21 establish unsuitability for parole may contribute to a pattern which results in finding of  
22 unsuitability.

23 Id. § 2402(b).

24 Circumstances tending to show unsuitability for parole include the nature of the commitment  
25 offense, and consideration of whether "[t]he prisoner committed the offense in an especially heinous,  
26 atrocious or cruel manner." Id. § 2281(c). This includes consideration of the number of victims,  
27 whether "[t]he offense was carried out in a dispassionate and calculated manner," whether the victim  
28 was "abused, defiled or mutilated during or after the offense," whether "[t]he offense was carried out  
in a manner which demonstrates an exceptionally callous disregard for human suffering," and  
whether "[t]he motive for the crime is inexplicable or very trivial in relation to the offense." Id.

Other circumstances tending to show unsuitability for parole are a previous record of

1 violence, an unstable social history, previous sadistic sexual offenses, a history of severe mental  
2 health problems related to the offense, and serious misconduct in prison or jail. See id.

3 Circumstances tending to support a finding of suitability for parole include no juvenile  
4 record, a stable social history, signs of remorse, that the crime was committed as a result of  
5 significant stress in the prisoner's life, a lack of criminal history, a reduced possibility of recidivism  
6 due to the prisoner's present age, that the prisoner has made realistic plans for release or has  
7 developed marketable skills that can be put to use upon release, and that the prisoner's institutional  
8 activities indicate an enhanced ability to function within the law upon release. See id. § 2281(d).

9 The regulations also contain a matrix of suggested base terms that prisoners with  
10 indeterminate sentence should serve before they are released on parole. The matrix provides three  
11 choices of suggested "base terms" for several categories of crimes. See CAL. CODE REGS. tit. 15,  
12 § 2403. If, as in Petitioner's case, the base offense is second-degree murder with the use of a  
13 dangerous weapon (knife), the matrix of base terms ranges from a low of seventeen, eighteen, or  
14 nineteen years, to a high of nineteen, twenty, or twenty-one years, depending on some of the facts of  
15 the crime.<sup>3</sup> See id. § 2403(c). Although the matrix is to be used to establish a base term, this occurs  
16 only once the prisoner has been found suitable for parole. See id. § 2403(a).

17 The statutory scheme places individual suitability for parole above a prisoner's expectancy in  
18 early setting of a fixed date designed to ensure term uniformity. Dannenberg, 34 Cal. 4th at 1070-  
19 71.

20 While subdivision (a) of section 3041 states that indeterminate life (i.e., life-maximum)  
21 sentences should "normally" receive "uniform" parole dates for similar crimes,  
22 subdivision (b) provides that this policy applies "*unless* [the Board] determines" that a  
23 release date cannot presently be set because the particular offender's crime and/or  
24 criminal history raise "*public safety*" concerns requiring further indefinite incarceration.  
(Italics added.) Nothing in the statute states or suggests that the Board must evaluate the  
25 case under standards of term uniformity before exercising its authority to deny a parole

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26 <sup>3</sup> One axis of the matrix concerns the relationship between murderer and victim and  
27 the other axis of the matrix concerns the circumstances of the murder. The choices on the axis for  
28 the relationship of murderer and victim are "participating victim," "prior relationship," "no prior  
relationship," and "threat to public order or murder for hire." The choices on the axis for the  
circumstances of the murder are "indirect," "direct or victim contribution," "severe trauma," or  
"torture." Each of the choices are further defined in the matrix. See CAL. CODE REGS. tit. 15,  
§ 2403(c).

1 date on the grounds the particular offender's criminality presents a *continuing public*  
 2 *danger*.  
 3 Id. at 1070 (emphasis, brackets and parenthesis in original). Indeed, the very regulation that  
 4 includes the matrix states that "[t]he panel shall set a base term for each life prisoner who is found  
 5 suitable for parole." CAL. CODE REGS. tit. 15, § 2403(a) (emphasis added). "[T]he Board,  
 6 exercising its traditional broad discretion, may protect public safety in each discrete case by  
 7 considering the dangerous implications of a life-maximum prisoner's crime individually."  
 8 Dannenberg, 34 Cal. 4th at 1071 (emphasis added). The California Supreme Court's determination  
 9 of state law is binding in this federal habeas action. See Hicks v. Feiock, 485 U.S. 624, 629 (1988);  
 10 Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979).

11 The California Supreme Court has determined that the facts of the crime can alone support a  
 12 sentence longer than the statutory minimum even if everything else about the prisoner is laudable.  
 13 "While the board must point to factors beyond the minimum elements of the crime for which the  
 14 inmate was committed, it need engage in no further comparative analysis before concluding that the  
 15 particular facts of the offense make it unsafe, at that time, to fix a date for the prisoner's release."  
 16 Dannenberg, 34 Cal. 4th at 1071; see also In re Rosenkrantz, 29 Cal. 4th 616, 682-83 (2002), cert.  
 17 denied, 538 U.S. 980 (2003) ("[t]he nature of the prisoner's offense, alone, can constitute a sufficient  
 18 basis for denying parole" but might violate due process "where no circumstances of the offense  
 19 reasonably could be considered more aggravated or violent than the minimum necessary to sustain a  
 20 conviction for that offense"). Granted the Ninth Circuit has stated that in some cases, "indefinite  
 21 detention based solely on an inmate's commitment offense, regardless of the extent of his  
 22 rehabilitation, will at some point violate due process, given the liberty interest in parole that flows  
 23 from the relevant California statutes." Irons, 479 F.3d at 665; see also Biggs, 334 F.3d at 917 n.5.

### 24 C. Analysis

25 On state habeas review, the California Supreme Court issued a summary denial of  
 26 Petitioner's state habeas petition. (Resp't Ex. 11.) Because there is no reasoned opinion addressing  
 27 the merits of Petitioner's due process claim, the Court must perform an independent review of the  
 28 record to ascertain whether the state court decision was based on an objectively unreasonable



1 application of clearly established federal law.<sup>4</sup> See Himes, 336 F.3d at 853.

2 **1. Opportunity to Be Heard and Reasons for Denial**

3 Having stated that California inmates still maintain a liberty interest, the Court analyzes the  
4 next prong of the Biggs test. Under the second prong of the Biggs test, the first question pertains to  
5 whether Petitioner was given an opportunity to be heard and whether he was given reasons for the  
6 parole denial. See Biggs, 334 F.3d at 913; Sass, 461 F.3d at 1126; Greenholtz, 442 U.S. at 16.

7 Petitioner fully participated in his parole hearing as evidenced by the transcript of the  
8 hearing. (Resp't Ex. 3.) Throughout the hearing, Petitioner was given the opportunity to make  
9 comments or objections in response to the BPT's statements, clarify any misunderstandings<sup>5</sup> and give  
10 statements regarding his parole eligibility. (Id.) In addition, the BPT laid out detailed reasons for  
11 denying Petitioner parole, which are discussed further below. The Court finds that the BPT satisfied  
12 the requirements for due process under this prong.

13 **2. "Some Evidence" Standard**

14 The next question is whether there was some evidence to support the BPT's decision to deny  
15 parole. What little guidance has come from the Supreme Court suggests that the "some evidence"  
16 standard is extremely deferential to the original decision-maker. See Hill, 472 U.S. at 454  
17 (examination of the entire record is not required nor is an independent assessment of the credibility  
18 of witnesses or weighing of the evidence; the relevant question is whether there is any evidence in  
19 the record that could support the conclusion reached by the decision-maker). Moreover, the  
20 Supreme Court's comments suggest that the judiciary should be quite mindful of the subjective and  
21 predictive nature of a parole board's decision. See Greenholtz, 442 U.S. at 13 ("No ideal, error-free  
22 way to make parole-release decisions has been developed; the whole question has been and will  
23

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24  
25 <sup>4</sup> The Court notes that the Alameda County Superior Court did not issue a reasoned decision  
26 addressing Petitioner's claim because his state habeas petition "fail[ed] to state a prima facie case for  
27 relief sought." (Resp't Ex. 8.)

28 <sup>5</sup> At the 2002 hearing, Petitioner clarified the BPT's summary of the circumstances  
surrounding the offense by stating the knife used to stab the victim was in between the bed mattress  
and not in his pocket. (Resp't Ex. 3 at 15:13-19.)

continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior.").

**a. The 2002 Parole Hearing**

Petitioner argues that the factors used by the BPT at the 2002 hearing were not supported by "some evidence," thus the denial of parole is in violation of his due process rights. (SAP at 4.)

At the 2002 hearing, the BPT identified several factors supporting its decision to find Petitioner unsuitable for parole: (a) the circumstances of the murder; (b) his criminal history and prior unstable social history; (c) his inadequate performance in prison; (d) his marginal vocational upgrade; and (e) his need for additional self-help and/or therapy programs. (Resp't Ex. 3 at 49:8-51:17.) The BPT also found that Petitioner "would pose an unreasonable risk of danger to society or a threat to public safety if released from prison." (*Id.* at 49:12-14.)

**1) The Commitment Offense**

At the 2002 hearing, the BPT considered the circumstances of the murder and concluded that it showed that Petitioner was unsuitable for parole and would pose an unreasonable risk of danger if released. (Resp't Ex. 3 at 49:11-13.) The panel stated that this was so because the offense was "carried out in a cruel, callous manner" which "demonstrates an exceptionally callous disregard for human suffering." (*Id.* at 49:14-18.) The panel then listed the fact-specific reasons it was finding Petitioner unsuitable for parole:

These conclusions were drawn from the Statement of Facts wherein the prisoner was at his home where he had an argument with his wife and with the victim, his wife's nephew, Cecil Marzett, who was 21 years old at the time. The two or the three went into the bedroom and were arguing and it escalated. Mr. Harris took a knife that was in the bedroom, apparently, and stabbed Mr. Marzett. Mr. Marzett died from the attack.

(*Id.* at 49:18-26.)

In deciding that this was a two-year denial, the BPT reiterated the violent nature of the crime and the manner in which it was carried out:

[T]he hearing Panel finds that there's no reason to expect that parole would be granted at a hearing during the following two years, this is a two-year denial. And the reasons are

as follows: firstly, the commitment offense, carried out in a cruel manner. Specifically he got into an argument with his wife and her nephew and ended up stabbing the nephew with a knife that was in the inmate's bedroom. The victim died from the attack. It was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

(Id. at 54:3-15 [brackets added].)

## 2) Prior Criminal History

The BPT considered all the relevant information in determining Petitioner's suitability for parole. The information considered included Petitioner's past criminal history, including involvement in other criminal misconduct pursuant to Title 15 of the California Code Regulations § 2402(b). The BPT found that Petitioner posed an unreasonable risk of danger to society if released based on his prior criminal history.

[H]e had failed to profit from society's previous attempts to correct his criminality. Those attempts include juvenile probation, an [sic] adult probation. As a juvenile he had an auto theft. As an adult he had around 10 arrests; however, there were only two convictions that we found, a grand theft property and a fighting, noise and offensive words. There were three DUI's that he says were not his and there are no dispositions shown, they were his brothers. And like I said there were several other arrests which did not result in any type of conviction.

(Id. at 50:1-12 [brackets added].)

## 3) Unstable Social History

The BPT relied on Petitioner's unfavorable social history in support of its decision to find him unsuitable for parole. According to the BPT, Petitioner dropped "out of school at an early age and he was a heavy user of alcohol. He told us today that he was drinking everyday to the point where he would pass out." (Id. at 50:13-15.)

## 4) Unfavorable Activities in Prison

The BPT determined that Petitioner's activities in prison were unfavorable, and this served as another reason to find him unsuitable for parole. Specifically, the BPT found that Petitioner had committed four serious disciplinary violations (CDC 115's) and received nine counseling memorandum (CDC 128's) since his last physical appearance before the BPT:

He's had misconduct while incarcerated has included 11 128's, nine of those are since his last physical appearance before the Board. The most recent were failure to attend, two of

those in 2002, or failure to report, 2000, failure to report, '97; failure to follow orders, '97, failure to report, '95; disrespect towards staff, '94; disruptive behavior, '93; and not obeying the rules and regulations in '92. He's had five 115's, four of those since his last physical appearance. He's not been physically before the Board for 10 years, so they go back a ways. The most recent was May of '97, for threatening staff. Prior to that, July of '96, possession of inmate manufactured alcohol. Prior to that, February of '94, possession of marijuana, and then January 12, 1993, knowingly providing false or slanderous information in an appeal.

(Id. at 50:23-51:14 [brackets added].)

#### 5) Need for Further Self-Help or Therapy Programming

The BPT found that Petitioner had not "sufficiently participated in beneficial self-help and/or therapy programming." (Id. at 50:21-23.)

Despite examining the factors of suitability that would support parole, i.e., that Petitioner had plans for where to live and work if released and that he was upgrading educationally, the BPT found that Petitioner still "need[ed] continued self-help and/or therapy programming in order to face, discuss, understand, and cope with stress in a non-destructive manner." (Id. at 53:8-12..) The BPT determined that "[u]ntil progress is made, he continues to be unpredictable and a threat to others." (Id. at 53:12-14.) The BPT noted:

His gains are relatively recent, so he must demonstrate an ability to maintain gains over an extended period of time, I refer to the 1997 115. Nevertheless, the prisoner should be commended for his upgrading educationally. He's working towards his GED, and is making very slow progress, but is making progress towards that. He's taking courses in Bible study, AA and NA, Life Plan for Recovery. He's been in substance abuse training, there's a 15-hour course. He's currently in the Eagle program, and another, other programs through this Graystone Chapel. He's got a couple of certificates from them and should be commended on those positive aspects of his behavior, but they do not yet outweigh the factors of unsuitability.

(Id. at 53:14-54:3.)

#### 6) Conclusion

As noted supra, the panel identified the fact-specific reasons to support its conclusion that Petitioner was unsuitable for parole. Contrary to Petitioner's arguments in his SAP and traverse, the record shows that the BPT's findings were supported by some evidence. The records show that the BPT conducted a thorough review and consideration of Petitioner's individual factors tending to show unsuitability and suitability for parole. Indeed, the BPT recognized Petitioner's participation in

1 AA and NA, educational programs and parole plans. Nevertheless, the BPT found that Petitioner  
2 was not yet suitable for parole because "he's not yet sufficiently participated in beneficial self-help  
3 and/or therapy programming," "would pose an unreasonable risk of danger to society or threat to  
4 public safety," has a history of prior criminality and unstable social history, and has performed  
5 inadequately in prison.

6 Having reviewed the facts of the crime as recited by the BPT and the other reasons stated for  
7 finding Petitioner ineligible for parole, the Court finds that there was some evidence in the record to  
8 support the BPT's decision. See Hill, 472 U.S. at 455-56. Accordingly, Petitioner's claim of habeas  
9 relief fails because the Court finds that the state court's denial of Petitioner's due process claim was  
10 objectively reasonable. See Himes, 336 F.3d at 853.

### 11 **3. Matrix Argument**

12 Petitioner further claims that the BPT violated his right to due process because he is overdue  
13 for release under the BPT's sentencing matrix. (SAP at 3.)

14 As explained previously, the matrix is not consulted and a term is not set under state law  
15 unless and until the prisoner is found suitable for parole. See Dannenberg, 34 Cal. 4th at 1070-71;  
16 CAL. CODE REGS. tit. 15, § 2403(a). Petitioner was not found suitable for parole; therefore, the  
17 matrix did not need to be consulted. Moreover, the BPT determined that Petitioner was unsuitable  
18 for parole after considering the factors outlined above. Thus, Petitioner's claim that there was "no  
19 real evidence" to deny him parole is unavailing. Even if Petitioner had a due process right in having  
20 state law followed by the parole authority, state law was followed by the BPT. Accordingly,  
21 Petitioner's claim is without merit.

### 22 **CONCLUSION**

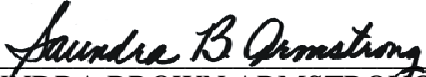
23 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Clerk of  
24 the Court shall enter judgment, terminate as moot all pending motions, including Petitioner's motion  
25 for leave to consolidate and motion for leave to file supplemental pleadings (docket nos. 60, 63), and  
26 close the file.  
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28 This Order terminates Docket nos. 60 and 63.

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IT IS SO ORDERED.

DATED: September 28, 2007

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

HARRIS,

Plaintiff,

v.

POWERS et al,

Defendant.

Case Number: CV04-01478 SBA

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 4, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Marvin Cavil Harris C-91589  
Avenal State Prison  
#530-8-54-Low Bunk  
P.O. Box 9  
Avenal, CA 93204

Dated: October 4, 2007

Richard W. Wieking, Clerk  
By: LISA R CLARK, Deputy Clerk